COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own motion as to the propriety of the rates and charges set forth in the following tariffs: M.D.T.E. Nos. 14 and 17, filed with the Department on April 2, 1999, to become effective May 2, 1999, by New England Telephone and Telegraph Company d/b/a/ Bell Atlantic

D.T.E. 98-57

MOTION OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

AND COVAD COMMUNICATIONS COMPANY FOR RECONSIDERATION

AND FOR EXTENSION OF THE JUDICIAL APPEAL PERIOD

On February 16, 2001, by hearing officer memorandum in this docket, the Department of Telecommunications and Energy ("Department" or "DTE") notified the parties in this docket that "after review and consideration, the Department stamp-approved Verizon's January 12, 2001 tariff filing on February 15, 2001." Pursuant to 220 CMR 1.11(10), AT&T Communications of New England, Inc. ("AT&T") and Covad Communictions Company ("Covad") hereby move for reconsideration of the Department's approval of Verizon's January 12, 2001 tariff filing. In particular, for the reasons set forth below and in AT&T and Covad's February 1, 2001 petition, AT&T requests that the Department investigate certain provisions in Verizon's January 12, 2001, tariff filing and suspend and investigate certain other provisions. AT&T and Covad also move for extension of the judicial appeal period pending the Department's consideration of and decision on AT&T and Covad's motion for reconsideration. The grounds for these motions are set forth below.

Procedural Background

Prior to February 15, 2001, when the Department approved tariff revisions filed by Verizon on January 12, 2001, the clear language of Part E, Section 2.6.3.C. of Tariff No. 17 required that Verizon charge CLECs for the amount of power that Verizon provided to CLECs.(1) On January 12, 2001, Verizon filed tariff revisions and additions. One of them modified Section 2.6.3.C by eliminating the language that required Verizon to base its DC charges on the amount of power provisioned to the CLEC; the same modification also added language to indicate that the power charges would be based on both the amount of power requested and the number of feeds connecting Verizon's power source to the CLEC's equipment.(2) Another modification added inspection, auditing and certification provisions in Sections 2.3.5.E. and 2.3.5.F. Verizon provided no explanation for any of the proposed tariff changes or additions.

On January 24, 2001, by hearing officer memorandum, the Department requested comments regarding the January 12 Tariff Filing. On February 1, 2001, AT&T and Covad

filed comments and requested, inter alia, that the Department suspend and investigate Sections 2.6.3.C (relating to DC power charges) and 2.3.5.E. and 2.3.5.F (relating to inspections and audits). In their comments and in support of their petition to suspend, AT&T and Covad objected to the proposed change that would permit Verizon to charge for more DC power than Verizon provisions to a CLEC and objected to Verizon's audit and inspection proposals.

In the January 24, 2001, hearing officer memorandum, the Department also requested Verizon to explain the changes proposed in the January 12, 2001 tariff filing. On February 1, 2001, Verizon filed a two page letter purporting to explain the proposed tariff changes. With respect to the changes to Part E, Sections 2.6.3.C (relating to DC power charges) and 2.2.3.E. and 2.2.3.F (relating to inspections and audits), the total of Verizon's explanation was limited to the following:

The final tariff change proposed in the filing is intended to address an issue that was raised in Verizon MA's initial 271 filing with the FCC regarding the application of power rates. Under the existing tariff, Verizon MA charges for DC power on a per fused amp basis. The proposed tariff changes the application of the DC power charge so that it applies only to the number of amps requested by a CLEC. This change in how the rate is applied substantially reduces the effective power charges. In connection with this revision, Verizon MA also proposes regulations for random inspections to verify actual power load drawn by physical collocation arrangements.

On February 15, 2001, the Department stamp-approved Verizon's January 12, 2001 tariff filing and notified the parties to D.T.E. 98-57 by hearing officer memorandum distributed by e-mail on February 16, 2001. The hearing officer memorandum stated that the Department's approval was made "after review and consideration."

Argument

I. STANDARD OF REVIEW FOR MOTION FOR RECONSIDERATION.

Although the Department's rules establish a party's right to seek reconsideration of a Department order, they do not set forth the standard by which the Department should evaluate a motion for reconsideration. See 220 CMR 1.11(10). The Department has developed such standards over the years on a case-by-case basis. There are general standards for determining when the Department will grant a motion for reconsideration. See, e.g., Bay State Gas Company, D.P.U. 92-111-A (1993) at 2 ("A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered."). See also Commonwealth Electric Company, D.P.U. 91-3B-1 at 5-6. ("Reconsideration is appropriate when there are previously unknown or undisclosed facts that would have a significant impact on the Department's decision or if the Department's decision is arguably the result of mistake or inadvertence."). Recently, the Department added a new ground for granting a motion for reconsideration. In Petition of CTC Communications Corp., D.T.E. 98-18-A at 2, the Department granted a motion for reconsideration because it had provided inadequate opportunity for parties to present evidence and argument on an issue it decided in a final order. The grounds for this motion satisfy the third criterion. Yet, the most compelling ground for reconsideration is that the Department approved the tariff without evidence or explanation in violation of the Administrative Procedures Act.

II. THE DEPARTMENT'S APPROVAL OF A CHALLENGED TARIFF CHANGE WITHOUT EVIDENCE OR EXPLANATION IS A VIOLATION OF LAW.

Under G.L. c. 159, § 17, Verizon's charges must be just and reasonable. Specifically, G.L. c. 159, § 17, states:

All charges made, demanded or received by any common carrier for any service rendered or performed, or to be rendered or performed by it or in connection

therewith in the conduct of its common carrier business . . .shall be just and reasonable, and . . . every unjust or unreasonable charge is hereby prohibited and declared unlawful[.]

Moreover, when Verizon proposes a revision to its tariff that has rate effects, the burden is on Verizon to demonstrate that its rates are just and reasonable. See, Metropolitan District Commission v. Department of Public Utilities, 352 Mass. 18, 25 (1967) ("where a reduction or other adjustment is sought in an existing rate . . . which has been approved for general application, the party seeking the benefit of such adjustment has the burden of proving that the existing rate should be changed"). See also, Fitchburg Gas & Electric Light Co. v. Department of Public Utilities, 375 Mass. 571, 582 (1978) (utility required to prove the reasonableness of its rates). Although in the absence of challenge, the Department may allow proposed rates to go into effect, when the rates are challenged they lose whatever presumption of being just and reasonable they may have. Indeed, the failure of a utility to provide support for challenged rates leaves the rates unsupported by substantial evidence. In Fitchburg Gas And Electric Light Company v. Department Of Public Utilities, the Court stated:

As to substantial evidence, a preliminary note is in order. Within a substantial range, business decisions are matters for the Company's determination. . . . Even in such matters, however, the Company when challenged must come forward with evidence to explain its decisions and show that they are not inconsistent with valid policies enforced by the Department.

Id. at 578-579 (emphasis added).

Once a rate has been challenged, the burden is placed on the proposing utility to support it, and it is the Department's responsibility to determine that the proposed rate is just and reasonable. In the discharge of its responsibilities, the Department must, under the Administrative Procedures Act, take evidence and make findings. Almeida Bus Lines v. Department of Public Utilities, 348 Mass. 331, 339 (1965) ("Under G.L. c. 30A, § 11, administrative agencies are required to hear parties, consider evidence and make records available in much the same manner as do courts."). The Department must provide a statement of the reasons for any decision it makes, including a determination of each issue of fact or law necessary to make its decision. See, Stow Municipal Electric Department v. Department of Public Utilities, 426 Mass. 341, 344 (1997). See also, 220 CMR 1.12 ("All decisions of the Department shall be in writing and shall be accompanied by a statement of reasons for the decision.")

A. The Department's Approval of a Challenged Rate Change Without Evidence or Explanation Violates Procedural Requirements.

In the present case, as explained in the February 1, 2001, petition of AT&T and Covad to suspend the tariff changes proposed for Part E, Section 2.6.3.C. of Tariff No. 17 ("AT&T/Covad Petition"), Verizon proposed to modify the language that defines the manner in which its DC Power rates are applied, with the effect that Verizon may charge twice the amount (or more) permitted by the language of the previous tariff. Under the previous tariff language, Verizon was permitted to charge for each "amp provided" and Verizon's charges were to be "based on the total power provisioned." Under the new tariff language, Verizon uses the same per amp charge, but applies it instead to a multiple of the number of amps provided, where the multiple is based on the number of feeds that connect the power source to the CLEC. The new tariff language, therefore, substantially increases the permitted charges for providing the same amount of DC power. See, AT&T/Covad Petition at 8-11.

Nowhere in this record has Verizon presented any evidence - much less, substantial evidence - that the proposed changes are reasonable. There is no evidence that the charges for DC power it now proposes are just and reasonable. The one paragraph "explanation" that Verizon provided does not even mention the change that now permits Verizon to charge a multiple of the number of amps provisioned, where the multiple is based on the number of feeds. (Verizon's February, 2001, "explanation"

related to the separate issue of whether charges should be based on "fused" versus "load" amps.)

Indeed, there is every reason to believe that the new charges are not reasonable. The DC power charges that the Department had approved for collocated equipment were calculated per amp of power supplied to the CLEC. In the Phase 4-G Order approving Verizon's proposed charges for collocation power, the Department approved a "cost per DC amp" that was "derived to charge collocators for power according to their specific amperage requirement," where "the level of power demanded is determined by the collocator based on the equipment that collocator decides to put in the cage." Consolidated Arbitrations Docket, Phase 4-G Order at 17-18 (June 11, 1998). Thus, when the rate as developed is multiplied by the number of amps supplied (as required under the original language in Tariff No. 17),(3) it produces sufficient revenues for Verizon to recover its DC power costs. Under the new language, however, the same rate is multiplied by the number of amps supplied and then multiplied again by the number of feeds connecting the equipment supplying the power to the equipment using the power. Since Verizon's collocation application expressly requires two feeds, as a matter of arithmetic, Verizon has at a minimum doubled its charges with the filing of this new tariff language, while presenting no evidence of increased costs. Based on the facts available to the parties and the Department, Verizon's charges are, on their face, unjust and unreasonable.

A simple example illustrates just how unreasonable the rates are. Assume a CLEC has collocated equipment that drains a maximum of 200 amps which Verizon must supply. The cost to Verizon (including a return on investment) of providing that power is approximately $20 per month per amp, or $4,000 for 200 amps. See, Part M, Section 5.2.3 of Tariff 17. Verizon's changed language, however, now permits it to charge $8,000 per month because the CLEC has two feeds connecting its 200 amp equipment to Verizon's DC power supply. Assuming 1,600 pieces of collocated equipment in Massachusetts (one for each collocation arrangement),(4) each with a maximum 200 amp drain, Verizon will be able to charge $12.8 million per month, or $158.6 million per year, half of which is pure windfall.

Clearly a tariff that imposes such outrageously overstated charges, as well as extreme and costly penalties discussed below, should be suspended and investigated before it is approved.(5)

B. The Department's Approval of a Challenged Tariff Addition That Allows Verizon To Impose On Its Competitors Costly New Inspection Requirements And Penalty Provisions Without Evidence or Explanation Violates Procedural Requirements.

The new tariff language also gives Verizon significant new rights to impose on CLECs expensive new audit and inspection requirements and to require CLECs to reimburse Verizon for Verizon's own expenses, in addition to bearing their own costs. Specifically, Sections 2.2.3.E. and 2.2.3.F. of Part E in Tariff No. 17 give Verizon the right to perform random inspections of actual power load, to charge for its costs of conducting such inspections, to charge hugely punitive penalties for even the slightest, technical violation of the related tariff provisions and to require CLECs to submit burdensome, notarized certifications of usage annually.

Despite the obvious opportunity presented by these new powers to harass and impose costs on competitors, Verizon has presented absolutely no evidence or explanation showing why such provisions are necessary, appropriate or reasonable. The sum total of Verizon's explanation appears in its February 1, 2001, letter to the Department, which states:

In connection with this revision [changing "fused amps" to "load amps"], Verizon MA also proposes regulations for random inspections to verify actual power load drawn by physical collocation arrangements.

Such a statement hardly satisfies Verizon's burden to demonstrate that the proposed tariff additions challenged by AT&T and Covad are reasonable. Fitchburg Gas & Electric Light Co. v. Department of Public Utilities, 375 Mass. 571, 578-579 (1978).

Moreover, the Department's stamp-approval does not satisfy the requirement of the Administrative Procedures Act that a Department decision resolving a dispute between two parties be in writing and accompanied by a statement of reasons. Stow Municipal Electric Department v. Department of Public Utilities, 426 Mass. 341, 344 (1997).

Indeed, it is especially important that Verizon be required to justify its proposed penalties, given the excessive, disproportionate impact that they will have on Verizon's competitors. For example, recall the CLEC which has collocated equipment that draws a maximum of 200 amps. As noted above, that CLEC already pays $8,000 per month for the right to draw power that costs Verizon $4,000 per month to provide. Assume that, on one of its random, unannounced inspections, Verizon claims that the equipment was drawing 201 amps at the time of the inspection. Verizon would

[assess] a penalty fee equal to two times the total amps fused to the collocation arrangement for the time period from when the arrangement was installed (or converted to the power load billing method) to the date that the inspection revealed a violation. The penalty fee is in addition to the monthly rate applicable for DC power.

Section 2.3.5.E. That means that Verizon would charge, on top of the $8,000 per month, $20 per amp per month for twice the following number of amps: 200 amps x 2 (for feeds) x 1.5 (for fuses) = 600 fused amps. As a result, the total penalty payment per month, on top of the $8,000 per month standard rate would be $24,000 per month (600 fused amps x 2 x $20 per month). Under Verizon's tariff, this charge would be applied for every month since the arrangement was installed. If, for example, the arrangement had been installed for a mere two years, Verizon's penalty payments for a one amp violation would amount to $576,000. If the arrangement had been in place for three years, Verizon's penalty payments for a one amp violation would amount to $864,000. Penalty amounts that are imposed without regard to the size or duration of the violation will have a most perverse effect on business. No CLEC, indeed no company, can continue to operate indefinitely with a contingent liability that increases each month just by being in business. Moreover, on top of all that, Verizon is then permitted going forward to charge the CLEC on the basis of "fused amps" rather than amps. See, Section 2.3.5.E.2.

Clearly, given the potential harm that Verizon could cause with such penalty rights (including the ability to put its competitors out of business),(6) such provisions must not only be justified (which Verizon has not done); they must also include strict safeguards against Verizon abuse. Yet, in the present language, there is none. Because the inspections are made at random and without announcement, there is no check on Verizon to ensure the accuracy of Verizon's measurements. There is no way to know whether errors are introduced as a result of faulty measuring equipment or as a result of the Verizon technician measuring the wrong circuit, to name only two of countless possibilities. Indeed, there is no way to prevent Verizon from using the inspections themselves as a means of imposing additional costs on its competitors. In AT&T's past experience, AT&T has found that Verizon will frequently charge as much as $1,000 per routine inspection of the sort that would be required here. (7)

The Department's approval of Verizon's onerous inspection and penalty provisions after review and consideration without a statement of the reasons, including a determination of each issue of fact or law necessary to make its decision constitutes reversible error. Stow Municipal Electric Department v. Department of Public Utilities, 426 Mass. 341, 344 (1997). See also, 220 CMR 1.12 ("All decisions of the Department shall be in writing and shall be accompanied by a statement of reasons for the decision.") AT&T and Covad urge the Department to grant this motion for reconsideration in order to cure this legal defect.

III. THE DEPARTMENT PROVIDED INADEQUATE NOTICE AND OPPORTUNITY FOR PARTIES TO PRESENT EVIDENCE AND ARGUMENT ON AN ISSUE BEFORE DECIDING IT IN A FINAL ORDER.

In Petition of CTC Communications Corp., D.T.E. 98-18-A ("CTC"), Bell Atlantic filed a motion for reconsideration on the grounds that its due process rights were

violated because the Department did not conduct an evidentiary hearing before issuing a final decision. Although Bell Atlantic had been given an opportunity to file comments, it maintained that it was not aware at the time comments were filed that the Department intended to move immediately to a final decision. Finding that, "whether arising from oversight or from misunderstanding of the record, the Department's failure to adequately signal the parties that it would render a final decision without further proceedings did not comport with the requirements of due process," the Department granted Bell Atlantic's motion for reconsideration. Id. at 10.

The facts of the present case are remarkably close to those in CTC Communications. In the present case, in accordance with the Department's usual practice, the Department requested comments on Verizon's proposed tariff revisions. AT&T and Covad filed their preliminary comments and had anticipated that the Department would, in accordance with its usual practice, suspend and investigate the tariff (or at least investigate it), because the comments revealed a material issue. The Department certainly gave no indication that it intended to make a decision on a tariff revision that materially increases rates without taking any evidence or providing further process. Indeed, the parties had every reason to believe that the Department did contemplate additional process, given its practice of providing for process on each of the contested issues in Tariff No. 17. Because "the Department's failure to adequately signal the parties that it would render a final decision without further proceedings did not comport with the requirements of due process," the Department should grant AT&T and Covad's motion for reconsideration in the present case, as it granted Bell Atlantic's motion for reconsideration in CTC.

IV. THE DEPARTMENT SHOULD ACT EXPEDITIOUSLY TO PREVENT THE ACCUMULATION OF ADDITIONAL DAMAGES FOR WHICH AT&T AND COVAD MUST SEEK RELIEF IN ITS COLLOCATION COMPLAINT AGAINST VERIZON FOR OVERCOLLECTION OF DC POWER CHARGES.

In its February 28, 2001, comments filed at the FCC in CC Docket No. 01-9, the Department stated:

Moreover, the Department opened a proceeding earlier this year, D.T.E. 01-20, to investigate all of VZ-MA's unbundled network element ("UNE") and resale rates, which will include its collocation power charges.

Although AT&T and Covad welcome the willingness of the Department to consider the appropriate rate for DC power in D.T.E. 01-20 and intend to avail themselves of the opportunity provided by the Department, such opportunity does not fully address the current problem. Currently, Verizon has in effect a tariff that purportedly allows it to collect charges that are multiple times higher than the cost of the service that it renders. Every day that passes, CLECs are paying excessive charges and Verizon is receiving a substantial windfall. The possibility that, at the conclusion of D.T.E. 01-20, the Department will adjust Verizon's rates to a reasonable level prospectively does not address the current need to prevent the overcharges that the recently proposed and approved language purportedly permit.

AT&T and Covad intend to seek, pursuant to their complaint filed on February 22, 2001, a refund of Verizon's continuing overcharges following the February 15, 2001, effective date of the new tariff language. The Department, nevertheless, should act immediately to restore the rate application language that does not permit Verizon to multiply requested power amounts by the number of feeds. By doing so, the Department will reduce the damages recoverable by AT&T and Covad on their collocation complaint.

V. THE DEPARTMENT SHOULD STAY THE JUDICIAL APPEAL PERIOD UNTIL TWENTY DAYS AFTER IT RENDERS A DECISION ON THIS MOTION FOR RECONSIDERATION, AND IN ANY EVENT SHOULD STAY THE JUDICIAL APPEAL PERIOD PENDING A DECISION ON THE MOTION FOR STAY.

G.L. c. 25, § 5, provides in pertinent part that a petition for appeal of a Department order must be filed with the Department no later than twenty days after service of the order "or within such further time as the commission may allow upon

request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling." Id. (emphasis added). See also, 220 C.M.R. 1. 11 (11) (reasonable extensions shall be granted upon a showing of good cause). The Department has stated that good cause is a relative term and depends on the circumstances of an individual case. Boston Edison Company, D.P.U. 90-335-A at 4 (1992).

The Department stamp-approved Verizon's proposed tariff on February 15, 2001, and on February 16, 2001, served notice of such action by electronic mail on the parties in D.T.E. 98-57. A motion for stay of the judicial appeal period in this case must therefore be filed on or before March 8, 2001. Consequently, this motion for stay is timely. This motion for stay is also supported by good cause, because AT&T and Covad seek this stay of the judicial appeal period in order to avoid burdening the Supreme Judicial Court with an appeal that can be avoided by further procedure at the Department.

In any event, in accordance with the Department's usual practice, the Department should stay the judicial appeal period pending a decision on this motion for stay. See, Fitchburg Gas and Electric Light Company, D.T.E. 97-115/98-120-A (March 31, 1999), citing Nandy, D.P.U. 94-AD-4-A at n.6 (1994), and Nunnally, D.P.U. 92-34-A at 6, n.6 (1993).

Conclusion

For the foregoing reasons, AT&T and Covad request that the Department grant this motion for reconsideration and this motion for stay of the judicial appeal period.

Respectfully submitted,

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March 7, 2001.

1. 1 Section 2.6.3.C had stated (emphasis added):

DC Power -- Applies for the provision of - 48V DC protected power required by the CLEC equipment in the multiplexing node. The power is assessed per fused amp provided, and will be based on the total power provisioned to the multiplexing node (greater than 60 amps, or less than or equal to 60 amps). The rate applies according to geographic designations (metro, urban, suburban or rural).

2. 2 The new Section 2.6.3.C reads (emphasis supplied):

DC Power -- Applies for the provision of - 48V DC protected power required by the CLEC equipment in the multiplexing node. The power is assessed per load amp, per feed requested. The rate applies according to geographic designations (metro, urban, suburban or rural).

3. 3 As the Department is aware, AT&T and Covad filed a complaint against Verizon on February 22, 2001, based on the filed rate doctrine because Verizon did not charge in accordance with the language in its tariff.

4. 4 In its FCC filings (11/22/00), Verizon stated that through July 2000, it had provisioned over 1,600 collocation arrangements. See, Verizon Application, at p. 14. Attachment 1 to Verizon's filing was the Lacouture/Ruesterholz Declaration. In paragraph 34 of the Declaration, they restate the 1,600 figure and in paragraph 35, they break down the 1,600 total into 759 traditional physical collocation arrangements and 850 cageless arrangements (705 SCOPE and 145 CCOE). They also state, in paragraph 34, that there were 170 collocation arrangements in progress at the time of the filing.

5. 5 If the Department does not investigate the tariff, at a minimum it must provide the rationale underlying a decision that doubled rates that the Department only recently determined were reasonable without any evidence of increased costs. The failure of the Department to explain its reasons for approving a substantial rate increase, in the absence of any evidence, over a rate it had previously determined to be reasonable constitutes a violation of the reasoned consistency doctrine. Under that doctrine, "a party to a proceeding before a regulatory agency such as the Department has a right to expect and obtain reasoned consistency in the agency's decisions." Boston Gas Co. v. Department of Public Utilities, 367 Mass. 92, 104 (1975). See also, id. at 105 ("In view of the Deparment's prior pattern of treatment of this item, an unexplained deviation from that pattern cannot be permitted."). "Reasoned consistency" usually requires some evidence for altering a previous determination, or, in the absence of evidence, a statement of reasons for the change. Id. In this case, the Department has provided neither, and would not--accordingly--enjoy customary deference upon review.

6. 6 Interestingly, the application of these onerous inspection and penalty provisions to physical collocation arrangements, but not to virtual collocation arrangements may be facially discriminatory. The large users of DC power are the data CLEC collocators. Most of them establish a physical collocation presence. Verizon's data CLEC affiliate, however, does not use physical collocation arrangements. When Verizon transferred its assets to its data CLEC affiliate, these assets were kept in place and became virtual collocation arrangements. As a result, the power drain from the equipment of Verizon's data affiliate can exceed its permitted amount without penalty because it is in a virtual collocation arrangement.

7. 7 At a minimum, any inspection that Verizon undertakes should be done at Verizon's expense, as is typical in commercial contracts, unless a significant discrepancy is found.